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No. 86-3

In The
Supreme Court of the United States
October Term, 1986

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SUZANNE LINDLEY DALY,
Petitioner,

vs.

NAN TOEWS DALY,
Respondent.

---o---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

---o---

PETITIONER'S REPLY TO THE BRIEFS OF RESPONDENT AND AMICUS CURIAE

---o---

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—TABLE OF CONTENTS—

Page

TABLE OF CONTENTS i.

TABLE OF AUTHORITIES ii.

INTRODUCTION 1

LEGAL DISCUSSION 3

A. The Issues Presented Here Raise Significant Federal Constitutional Questions Plainly Reviewable By This Court. 3

B. Amicus Curiae's Argument That Suzanne Daly "Never Brought A Facial Attack" On The Parental Termination Statute, NRS 128.105(4), Before the Nevada Supreme Court Is Unfounded And Utterly Without Merit, As That Issue Was Squarely Presented To The Lower Court. 5

C. Respondent's Argument That "No Substantial Federal Question Is Presented For Review By This Court," In That Suzanne Daly Is Not A Member Of A Suspect Class And Thus Was Not Denied Equal Protection Under The Law, Is A Straw Man. 7

CONCLUSION 10

—TABLE OF CONTENTS—

Page

TABLE OF CONTENTS i.

TABLE OF AUTHORITIES ii.

INTRODUCTION 1

LEGAL DISCUSSION 3

A. The Issues Presented Here Raise Significant Federal Constitutional Questions Plainly Reviewable By This Court. 3

B. Amicus Curiae's Argument That Suzanne Daly "Never Brought A Facial Attack" On The Parental Termination Statute, NRS 128.105(4), Before the Nevada Supreme Court Is Unfounded And Utterly Without Merit, As That Issue Was Squarely Presented To The Lower Court. 5

C. Respondent's Argument That "No Substantial Federal Question Is Presented For Review By This Court," In That Suzanne Daly Is Not A Member Of A Suspect Class And Thus Was Not Denied Equal Protection Under The Law, Is A Straw Man. 7

CONCLUSION 10

TABLE OF AUTHORITIES

—Cases—

	Page
Lassiter v. Department of Social Services 452 U.S. 18 (1981)	3
Lehman v. Lycoming County Children's Services 458 U.S. 502 (1982)	4
Lehr v. Robertson 463 U.S. 248 (1983)	5
Alsager v. District Court 406 F.Supp. 10 (S.D. Iowa 1975) 545 F.2d 137 (8th Cir. 1976)	6
Palmore v. Sidoti 466 U.S. 429 (1984)	5, 8, 9
Santosky v. Kramer 455 U.S. 745 (1982)	3, 5
Stanley v. Illinois 405 U.S. 645 (1972)	1, 3, 7

—STATUTES—

Nevada Revised Statutes	
30.130	6
128.105(4)	7

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—Introduction—

This case is about the permanent destruction of a natural parent's rights vis-a-vis her child, rights this Court has deemed "far more precious...than property rights." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). After a parody of a trial characterized by medieval hysteria and hyperbole, the courts of the State of Nevada issued a judgment severing all legal ties between Suzanne Daly and her daughter, Mary—based solely upon the conclusion of these courts that Mary's "best interests" would be jeopardized by having a parent who suffered from gender dysphoria and received medically-prescribed surgical treatment for that condition. That this case implicates the most fundamental rights guaranteed by the Constitution cannot intelligently be disputed.

Respondent refuses to acknowledge what this case is really about. She studiously attempts to blur the obvious distinction between a medical condition which affects one's gender and that which she describes as "sexual misconduct" or "sexual preference." Opposition, pp. 11, 13, 14. No doubt respondent's hysterical reaction to the condition of gender dysphoria, like that of the Nevada courts, reflects broadly-held societal prejudices. But the fact that prejudices exist in our culture cannot justify the Nevada courts' institutionalization of such prejudice; indeed, the social tragedy represented by this case—courts eschewing their traditional role of protectors *against* prejudice—compounds the devastating personal tragedy the case represents for Suzanne Daly.

Respondent relies upon the widespread ignorance and prejudices concerning gender dysphoria and its treatment—notwithstanding undisputed evidence in the record and a substantial body of literature indisputably establishing the seriousness of that medical condition and the legitimacy of surgical treatment—to defend the Nevada courts' arbitrary interference with commanding, constitutionally protected rights of parenthood. Respondent's attempt to obscure the constitutional ramifications of this case is ineffective. As we now explain in detail, Suzanne Lindley Daly wants no more, and certainly no less, than for this Court to acknowledge her right to be treated like any other parent, and to restore her coveted parental status.

—Legal Discussion—

The Decision of the Nevada Supreme Court To Permanently, Irrevocably And Completely Terminate Petitioner Suzanne Lindley Daly's Status As A Natural Parent Is Not "Based On Independent Grounds Of State Law," As Respondent Argues, But Is An Egregious, Unwarranted Violation Of Federally Protected Rights Afforded A Natural Parent. As Such, This Court Should Grant The Review Requested And Reverse The Decision Of The Nevada Supreme Court.

A. The Issues Presented Here Raise Significant Federal Constitutional Questions Plainly Reviewable By This Court.

In her brief in opposition to the petition, respondent argues that this case "fails to present a substantial federal question for review," and that the decision of the Nevada Supreme Court was "based on independent grounds of state law." Opposition, p. 2. This contention is utter nonsense. Even if this Court had not repeatedly held that parental rights are entitled to the most stringent federal constitutional protections, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972), the fundamental nature of the parent-child relationship makes it self-evident that a state court's determination to permanently and irrevocably extinguish that relationship is entitled to the closest constitutional scrutiny. If a state could insulate such determinations from federal constitutional scru-

tiny simply by purporting to base its decision upon "independent state grounds," the Fourteenth Amendment would effectively be excised from the Constitution.

But respondent goes on to argue that, in the area of parental rights, this Court has encouraged "innovation and experimentation without interference by the federal courts." Opposition, p. 4. For this proposition, she relies upon two of this Court's opinions, neither of which is remotely applicable here.

In *Lehman v. Lycoming County Children's Services*, 458 U.S. 502 (1982), this Court held that the statute conferring habeas corpus jurisdiction upon the federal courts could not be construed to permit the federal courts to consider a collateral challenge to a state statute pursuant to which state-intitiated proceedings had terminated the rights of a parent whose children had been in the custody of a state agency for five years. In concluding that the custody of children by a state agency was not the type of custody traditionally challenged by habeas corpus proceedings, this Court simply refused to expand its habeas jurisdiction to permit such a collateral attack. Indeed, far from broadly precluding its review of these important constitutional issues, this Court expressly recognized in *Lehman* that it "has considered constitutional challenges to custody or parental-rights proceedings, but these cases have reached the Court on direct review of the final state-court decision, not on federal habeas." *Id.* at 512, fn. 14. Thus, respondent's reliance on *Lehman* is totally misplaced, as that opinion directly supports Suzanne Daly's right to review of this case by direct attack and in no way supports respondent's attempt to persuade this Court to decline review.

Respondent next misinterprets narrow language from the dissenting opinion in *Santosky v. Kramer*, 455 U.S. 745 (1982). Although the *Santosky* dissenters did protest federal review of that case, two years later those same dissenters apparently reconsidered their position: They participated in this Court's decision to review, on writ of certiorari, and unanimously reverse, a state court judgment "divesting a natural mother of the custody of her infant child...." *Palmore v. Sidoti, supra*, 466 U.S. 429, 430 (1984). Thus the *Santosky* dissenters have recognized that review of family law issues by this Court cannot and should not be avoided where, as here, state court action has destroyed cherished parental rights:

> "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. *It is self-evident that they are sufficiently vital to merit constitutional protection ....*" *Lehr v. Robertson*, 463 U.S. 248, 256 (1983), emphasis supplied.

The Nevada Supreme Court's decision upholding the per - manent termination of Suzanne Daly's fundamental parental rights presents several important federal questions and is plainly reviewable by this Court. Respondent's arguments to the contrary are meritless and represent no barrier to review.

B. *Amicus Curiae's* Argument That Suzanne Daly "Never Brought A Facial Attack" On The Parental Termination Statute, NRS 128.105(4), Before the Nevada Supreme Court Is Unfounded And Utterly Without Merit, As That Issue Was Squarely Presented To The Lower Court.

Amicus curiae the State of Nevada ("State") erroneously contends that this Court should deny Suzanne Daly's petition because she did not raise before the Nevada Supreme Court her facial attack on the parental termination statute, NRS 128.105(4). A glance at Suzanne Daly's opening brief filed in the Nevada Supreme Court—relevant parts of which are attached hereto as an appendix—demonstrates without question that this issue was raised. Appendix, pp. 1-3. In that brief, Suzanne Daly plainly argued for reversal upon the grounds that the Nevada parental termination provisions are vague for three separate reasons recognized by the court in *Alsager v. District Court* , 406 F.Supp. 10, 18-19 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 137 (8th Cir. 1976): "(1) lack of warning as to proscribed conduct; (2) overbroad official discretion; and (3) undue inhibition of protected conduct." Appendix to Reply, p. 3.

The State also argues that to properly raise this issue below Suzanne Daly "would have had to serve the Attorney General of the State of Nevada with a copy of the proceeding." Opposition, p. 4. For this proposition, the State cites NRS 30.130. But that statute—which appears in a chapter of the Nevada Revised Statutes entitled "Uniform Declaratory Judgments Act"—requires service on the Attorney General *only* in proceedings in which "declaratory relief is sought," not in parental termination proceedings. Appendix to Opposition, p. 1a. The State fails to quote this portion of the statute in the text of its brief, and it is easy to understand why; the plain language of the statute itself demonstrates its inapplicability in the present case.

Accordingly, the State's argument that Suzanne Daly has not properly preserved the void-for-vagueness challenge of NRS 128.105(4) is patently incorrect.

C. Respondent's Argument That "No Substantial Federal Question Is Presented For Review By This Court," In That Suzanne Daly Is Not A Member Of A Suspect Class And Thus Was Not Denied Equal Protection Under The Law, Is A Straw Man.

The thrust of respondent's final argument is that Suzanne Daly is not a member of a suspect class, and thus the decision to terminate her parental rights is accorded only a "rational basis" standard of review. This argument is absolutely without merit. Suzanne Daly has never claimed that the fact that she suffered from gender dysphoria has made her a member of a suspect class; rather, she contends that it is the denial to her of her fundamental parental rights which invokes a stringent standard of review by this Court.

The issue was addressed and analyzed in *Stanley v. Illinois,* 405 U.S. 645 (1972). Applying the guarantees contained in the Equal Protection Clause, the *Stanley* court strictly reviewed the lower court's judgment terminating parental status, recognizing that:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is

made to liberties which derive merely from shifting economic arrangements." *Id.* at 652.

Thus, this Court has expressly instituted a strict standard of review over state court judgments terminating parental rights, while explicitly rejecting the lower level of review afforded purely economic classifications and deprivation of less fundamental rights.

Respondent also contends that the invidiously discrimi - natory treatment rendered Suzanne Daly as a parent solely because of her medical condition is not because of the conditions itself, but "because of its effect on the child."[1] Opposition, pp. 12, 14. A nearly identical argument was rejected by this Court in *Palmore v. Sidoti,* 466 U.S. 429 (1984). That case concerned a state court judgment denying custody of her children to a mother who had married a man of a different race. Like the Nevada courts here, the Florida courts in *Palmore* sought to disguise their prejudices by asserting that they had no choice but to protect the child from what they perceived as a childhood doomed to "suffer(ing) from the social stigmatization that is sure to come from living in a racially mixed household." *Id.* at 431. In that case, as in the case presently before this Court, there can be no disa - greement that "[i]t would ignore reality to suggest that...prejudices do not exist or that all manifestations of...prejudices have been eliminated." *Id.* at 433. Never- theless, this Court explained in *Palmore* that "the reality of private biases and the possible injury they might inflict are [not] permissible consideration for removal of a...child from

[1] Thus respondent appears to concede that the Nevada court terminated Suzanne Daly's rights as a natural parent based solely on its perception of the child's supposed "best interests" without any determination of parental unfitness. Opposition, pp. 2, 3, 7, 12, 14.

the custody of its natural [parent]." *Id.* Accordingly, a unanimous Court proclaimed that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," and reversed the state court judgment.

Suzanne Daly's status is that of a parent who suffered from the medical condition known as gender dysphoria. She realizes that prejudice toward her medical condition continues to blight our culture. That this prejudice exists is plainly evident from the majority opinion of the Nevada Supreme Court, which characterized Suzanne Daly's medical condition as a "choice," Appendix to Petition, p. 9, and is further illustrated by respondent's mischaracterization of Suzanne Daly's medical condition as an act of "selfishness." Opposition, p. 11. A gender dysphoric person neither chooses his or her condition nor acts selfishly in undergoing medically recommended treatment, any more than a person suffering from a herniated disk chooses to have back problems or acts selfishly in undergoing surgery or taking pain medication to relieve that condition. Yet, by constantly characterizing Suzanne Daly's condition as one freely chosen, respondent, the trial court, and three judges of the Nevada Supreme Court propagate and place a patina of legitimacy upon the unfortunate prejudices that underlay this entire proceeding.

Because Suzanne Daly has been denied her fundamental right to be a parent solely because of invidious discrimination, important federal questions are presented for review by this Court. Accordingly, this Court should grant the review requested and correct the unconstitutional termination of Suzanne Daly's parental rights.

—Conclusion—

For all these reasons, the briefs of both respondent and amicus curiae the State of Nevada fail to demonstrate any basis for denial of the relief requested by Suzanne Daly. Indeed, they demonstrate why review is desperately needed in this case—to correct the misunderstanding and prejudice concerning gender dysphoric individuals that afflicts our society and has wrought such tragic consequences for Suzanne Daly and her daughter. Accordingly, Suzanne Daly respectfully requests this Court to grant her Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Respectfully submitted,

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—APPENDIX—

B. Substantive Due Process

1. NRS Chapter 128 is void for vagueness as applied.

The essential substantive criteria of the trial court's inquiry are suspect. A number of cases have examined the concept of "best interests of the child" in the termination context.

In *Alsager v District Court* (DC Iowa 1975) 406 FSupp 10, a state court termination decision was challenged in a civil rights action. The opinion, affirmed on appeal (545 F2d 1137) noted the following:

a. Parents have fundamental liberty and privacy interests in their relationships with natural children. 406 FSupp at 16;

b. A state may not avoid vagueness by denominating the proceedings "civil". id. at 17;

c. The vague standard of "best interests" fails to give ample warning of proscribed conduct. id. at 17;

d. To sustain the burden of a compelling state interest, the consequences of termination must be found to be less harmful than those of continuation. id. at 23;

e. Notice of the proceedings must be specific factually and legally; a petition paraphrasing statutory language is procedurally unconstitutional. id. at 24.

Reference to the trial court's short decision (CI 50-53) shows the same lack of specificity that brought federal restraint in *Alsager*. Nowhere are the findings supported by evidence:

> "Due to circumstances brought about by her own actions a conduct, [petitioner], to date of the hearing, had been unable for whatever reason to put her life in a

> condition where it would be in the 'best interests' of Mary to have parental rights as to her." (CI 50:25-29)

What "circumstances"? What "actions and conduct"? What "reason"? What "condition"? What are Mary's "best interests"?

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare." (CI 51:19-24)

What "reason"? What standards are "minimal[ly] ac - ceptable"? What is the evidence of instability? How does one "qualify" for parental rights?

> "It appears to this court that the situation her is not re - solvable without hurting Mary deeply." (CI 52:20-21)

Where is the elimination of the counseling alternative—which has yet to be attempted—as a potential source of resolution?

Alsager listed three dangers of vague statutes: (1) lack of warning as to proscribed conduct; (2) overbroad official discretion; (3) undue inhibition of protected conduct. 406 FSupp at 18. The cure for vagueness is definitive narrowing construction by state courts. *Grayned v City of Rockford* (1972) 408 US 104. This court should construe the "best interests of the child" standard as permitting termination only as a prerogative of the state upon a threshold showing of serious and unmitigable objective harm to the

child. If that is done, this case must be reversed, remanded, and dismissed. Then, if Respondent wishes to pursue some protective limitation of [petitioner's] visitation rights, she can do so in modification of the existing custody decree. Such a construction would find accord with the limitations expressed by other high courts:

People in the Interest of C.S. (Colo 1980) 613 P2d 1304: Best interests of the child requires (1) a history of severe and continuous neglect by the parent sought to be terminated; (2) a substantial probability of specific future harm; (3) that continuation of the relationship can under no reasonable circumstances benefit the child;

Matter of Swartzfager (Ore 1981) 290 Or 799, 626 P2d 882: Courts should hesitate to terminate parental rights for "alienation" of parent-child relationship, regardless of whether parental conduct caused such alienation;

In Re Castillo (Utah 1981) 632 P2d 855: "... a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe is in the child's best interests ..." and "when it plainly appears that there is such ... deficiency ... in the parent-child relationship that the values inherent therein are almost entirely absent, the law recognized the need and provides the means for the termination of parental rights."

Matter of Doe (New Mexico 1982) 98 NM 198, 647 P2d 400: The court may not balance the backgrounds of the parties and decide which party may provide the "better" environment in termination actions.

Respondent and the trial court have applied the relative considerations of custody cases to the drastic and irrevocable decision to terminate fundamental rights. This court must define "best interests of the child" narrowly. Construed as a remedy of last resort, termination is clearly misapplied here.